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The State University Law School: I, Its Rise and Its Mission

BY CHARLES M. HEPBURN

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DOES the true mission of the state university law schools differ in any material respect from the true mission of other university law schools? If it does, what is this mission?

These related questions have been submitted to the deans of several state university law schools, east and west. The answers, in the form of distinct articles, will appear in later issues of the *Green Bag*. But as a preliminary to these more interesting articles, and while they are in the making, a few things may be said about the rise of law schools of this kind, their present number and their possible field of usefulness.

Between the opening of the earliest university law school in America and the opening of our earliest state university law school there was an interval of nine years. The Harvard Law School, succeeding a privately endowed professorship of law, began its career in 1817; the law school of the University of Virginia, an integral part of Jefferson's original plan for a state university, began in 1826.

In the view of today there is in this nothing that is specially significant. We have grown accustomed, through the experience of half a century, to an average of two new law schools a year; and today a six months old university of a new fledged state is hardly entitled to recognition unless it has its university school of law.

But such was not the view of the first quarter of the nineteenth century. The

tradition then, in America as in England, ran strongly against the idea of professional teaching of law in the universities.

Isolated college professorships in law had indeed appeared here and there, and had been held by distinguished lawyers. The law professorship which Jefferson, in 1779, induced the College of William and Mary to substitute for an existing professorship in divinity, had been occupied by Chancellor Wythe, and had numbered John Marshall in its list of students—the future Chief Justice thus attending the first course of law lectures ever given by a professor of law in an American college. Mr. Justice Wilson, of the Supreme Bench of the United States, with Wythe a signer of the Declaration of Independence, held for a time the law professorship which was established in 1790 in the College of Philadelphia. Chancellor Kent was the incumbent of the professorship of law which was established in Columbia College in 1793, and as such began that brilliant career of legal authorship for which he is chiefly remembered. And beyond the mountains, Henry Clay was for two years professor of law in Transylvania University, at Lexington, Kentucky.

These beginnings were auspicious enough. With all the prestige of the splendidly equipped law schools of today, it would be hard to match the opening of the first course of law lectures at Philadelphia in 1790; for the

lecturer had among his auditors the "President of the United States and his Cabinet, the Houses of Congress, the Executive and Legislative Departments of the Governments of the State of Pennsylvania, and the City of Philadelphia, the Judges of the Courts, the members of the Bar," and a brilliant array of ladies. But if these law professorships were established in the hope of developing into professional schools of law, each failed of its purpose. They failed none the less if they were patterned after the professorship of law which the author of Viner's Abridgment had founded at the University of Oxford for the benefit of non-professional students of the common law, and which in 1765 bore fruit in Blackstone's Commentaries.

In the latter aspect these early law professorships may some day serve as precedents when our universities, especially our state universities, recognize the need of affording the layman an opportunity to study the law of the land. In their own day, however, their fate served strongly to confirm lawyers in the belief that university law school teaching could not succeed in America.

Successful university law schools were, of course, well known to continental lawyers. The fame "of the mother of all the universities," the University of Bologna, rested chiefly on her school of law, which was founded about the year 1088, and for generations drew students of law from the four quarters of Europe. To it, in the latter end of the twelfth century, came Englishmen, to study law under Azo, "master of all the masters of law"; and it was from Azo's published works that the author of the first organic treatise on English law, Bracton, writing in the middle of the thirteenth century, drew the general

conception, the arrangement and the classification of his book.

The law school at Bologna brought others in its train. They flourished, these university law schools, in Italy, in France, in Spain, in Germany. At the opening of the nineteenth century the university law school was not only the accepted method of legal education on the Continent, but it was supported by the traditions of seven centuries.

These seven centuries, however, were without effect on the methods of legal education in England and America. Our traditional theory demanded law office instruction and the atmosphere of the courts. Nor was this unnatural, in the earlier stages of our law. We now define law as a science to be learned out of books; but for centuries the common law of England, whether regarded as a science or as an art, could be effectively studied only as it arose, in the courts at Westminster. Our books of the law were still to come. The long series of Year Books bear witness, it may be, to the earnest efforts of law students to catch the law living as it rose. In the absence of a native *corpus juris* a professional school of law was well nigh impossible at Oxford or Cambridge. There was the preference of the ecclesiastics, who were in control at the universities, for the civil and the canon law; there was also the reason given by Fortescue, that "at the universities of England the sciences are not taught but in the Latin tongue, and the laws of the land are to be learned in the three several tongues, to witte, in the English tongue, the French tongue, and the Latin tongue"; but if these obstacles to the study of the common law at the universities had been removed, there would still have remained a more serious difficulty — the lack of an adequate written

basis of investigation and instruction in our growing body of native law.

This deficiency could, no doubt, have been supplied long before the year 1800. But the tradition in favor of law office instruction had by that time taken deep root in England and America. The professional students of law, turning away from the universities which offered them nothing, gathered around the seat of the courts at Westminster. Even while the Inns of Court were active in the work of legal instruction, the students were in daily and diligent attendance on the courts. When the Inns ceased to give actual instruction, in the latter half of the seventeenth century, the law students were brought into still closer touch with the law offices, the actual work of the courts, and the study of law as an art. Such was their daily habit of life for centuries; it is not surprising that the vision of a professional law school on a university campus, remote from the courts and the haunts of lawyers, was regarded as foreign to the genius of the common law. For many years after the opening of the nineteenth century our prevailing theory of legal education was essentially the theory presented in Fortescue's *De Laudibus*. When the Prince enquires why the laws of England, being so excellent, are not taught in the universities, the Chancellor informs him that they are taught in a better place, in the Inns of Court, situated "where the courts of law are held, and in which the law proceedings are pleaded and argued, and resolutions of the court, upon cases which arise, are given by the judges."

That an American university could successfully maintain a school of medicine was not questioned. A medical school had been established in the College of Philadelphia, the forerunner of the University of Pennsylvania, in

1765, in King's College, the lineal ancestor of Columbia, in 1767, at Harvard in 1782, at Dartmouth in 1798. But the doubt whether a university law school could succeed held the minds of the profession until after 1850. Professor Dwight, speaking of the origin of the Columbia Law School, has borne witness to the misgiving, the trepidation, with which that school was opened in New York City in 1858. "Even thinking men, who believed in schools of theology and in colleges of medicine, had little or no faith in schools of law."

It was in such circumstances, and with this cloudy horizon, that our first state university law school was launched, at the University of Virginia. The year was 1826, the year in which the Yale Law School, already existing on a private foundation, became formally incorporated in the college. It was three years before the beginning of the new era of the Harvard Law School under Story.

This Virginia State Law School was definitely designed, not as a law professorship for the instruction of laymen in the law of the land, but as a complete professional school of law. Its design, however, reached further than mere technical training for practice at the bar. The state, in Jefferson's view, had an interest of its own to serve in affording an opportunity for the professional study of law. It owed to itself the duty to train up a young lawyer in the way he should go, that when he entered the legislature he might not depart from it. In a letter to James Madison, under date of February 26, 1826, Mr. Jefferson has this to say:—

"In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the Revolution, Coke Littleton was the Universal elementary book of law students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British consti-

tution, or in what were called English liberties. You remember also that our lawyers were then all Whigs. But when his black-letter text, and uncouth but cunning learning got out of fashion, and the honeyed Mansfieldism of Blackstone became the students' horn book, from that moment, that profession (the nursery of our Congress) began to slide into Toryism, and nearly all of the young brood of lawyers now are of that hue. They suppose themselves, indeed, to be Whigs, because they no longer know what Whigism or republicanism means. It is in our seminary that that vestal flame is to be kept alive; it is thence it is to spread anew over our own and the sister states. If we are true and vigilant in our trust, within a dozen or twenty years a majority of our own legislature will be from one school, and many deciples will have carried its doctrines home with them to their several states, and will have leavened thus the whole mass."¹

Notwithstanding the prejudice of the profession in favor of the atmosphere of the courts and law offices, this new law school was established not in any populous centre, nor at the state capitol, nor at the door of a court house, but on the campus of a newly created university a mile beyond a little town in Piedmont, Virginia. If the situation of the Harvard Law School at Cambridge was so unfortunate as to imperil its success, as some confidently asserted, the situation of the Law School of the University of Virginia should have meant its speedy death. Yet the school was a shining success. Neither the stress of civil war nor the presence of armies in line of battle along its horizon broke the continuity of its sessions. It withstood even the devastation of the reconstruction days.

The same faith in university law school teaching and the same sense of duty resting on the state to train those who were preparing for admission to the bar, were more strikingly manifested sixteen years later, when the second

state university law school was founded.

This occurred in the remote hill-country of southern Indiana, where, since the year 1820, a few far-seeing men had been laboring to build up an institution of higher learning. As early as 1835, the Board of Trustees of what was then Indiana College sought to open a school of law as a department of the college. They went so far as to call the foremost lawyer of his day in Indiana, Isaac Blackford, to be the first professor of law in the new school. Three years later the act of the legislature which converted the college into the present Indiana University expressly included "law" among the sciences which should be taught. A university school of law was accordingly opened at Bloomington, Indiana, as a department of this new state university, in 1842.

Four years later a law school was established at the University of North Carolina—the third in order of the state university law schools. In 1854 the present Law Department of the University of Mississippi was opened. In 1859 the University of Michigan, founded in 1837, opened its law school, with Judge Cooley as its resident professor.

Thus begun, the movement towards state university law schools was at first both slow and halting. The semi-centennial of the beginning of the movement showed only ten schools—the five already mentioned, and the law schools of the University of Georgia, the University of Wisconsin, the University of Iowa, and the University of Missouri. But the succeeding thirty-five years have added twenty-four schools to the list, seven of which appear within the five years beginning in 1906.

The growth and vigor of the schools themselves within the last five years

¹ For this extract from Mr. Jefferson's correspondence I am indebted to Mr. Lile, Dean of the University of Virginia Law School.

is no less remarkable. In the full catalogue of thirty-four schools two show an enrollment of more than five hundred students. Seven others exceed two hundred students. In many of them there has been of late a marked tendency to advance the standards of admission and to increase the length of the required course. No less marked is the recent improvement in the material equipment in libraries and buildings.

A comparison of these thirty-four schools shows a certain homogeneity. As a rule, they are in small towns, they are day schools, they are three-year schools, and they have remarkably low tuition fees. In several instances the tuition fee is only a third of that charged at Harvard, Yale, Columbia, Pennsylvania, or Chicago. In some it is only one-sixth. In others there is no tuition fee for resident students.

It would seem that law schools organized on this basis, and conducted largely at the expense of the Commonwealth, are the expression of some sense of obligation resting on the state. But what this obligation is, and whether it results in a mission which is different from or wider than the mission of non-

state schools, are questions to which the state university law schools themselves have so far given no clear answer. Rather we have copied the pattern, excellent in its way, of the non-state schools. Our catalogues reflect a trusting confidence that whatever is, is best.

But certainly there are opportunities which belong with peculiar fitness to the state law schools — opportunities directly in line with service to the state. To these schools, rather than to those on private foundations, belong the opportunity and the duty which Viner and Blackstone recognized more than a century and a half ago, the duty of enabling every man to obtain "a competent knowledge of the laws of that society in which we live." To the state schools belongs also the duty of providing the professional law student with an opportunity to study thoroughly the law of the state which maintains the school — the law of the jurisdiction. To them also belongs the privilege, if not the duty, of providing an educational uplift for the members of the bar within the state, through some proper form of extramural instruction in law.

Bloomington, Ind.

Get all the entertainment we can out of our work as we go along, for we may rest assured that if we postpone the fun of life until the work is done it will never come. It will find us dry and dusty as so many remainder biscuits after a voyage.

— *Joseph H. Choate.*